APPENDIX A.

Section 10 of Zoning Ordinance No. 502 of Respondent City of Manhattan Beach.

[Ex. 1 to Comp. R. 20B.]

SECTION 10. B-1 BEACH RECREATION DISTRICT

A. Land Uses Permitted

1—The following beach recreation activities: swimming, surf-fishing and athletics including operation of beach facilities for the above activities for an admission fee;

2—Rental of the following beach equipment: backrests, chairs, benches, picnic tables and stoves, umbrellas, wind screens; surf-rafts, surf-boards, surfing bags, paddle-boards, kayaks, canoes, and other small boats.

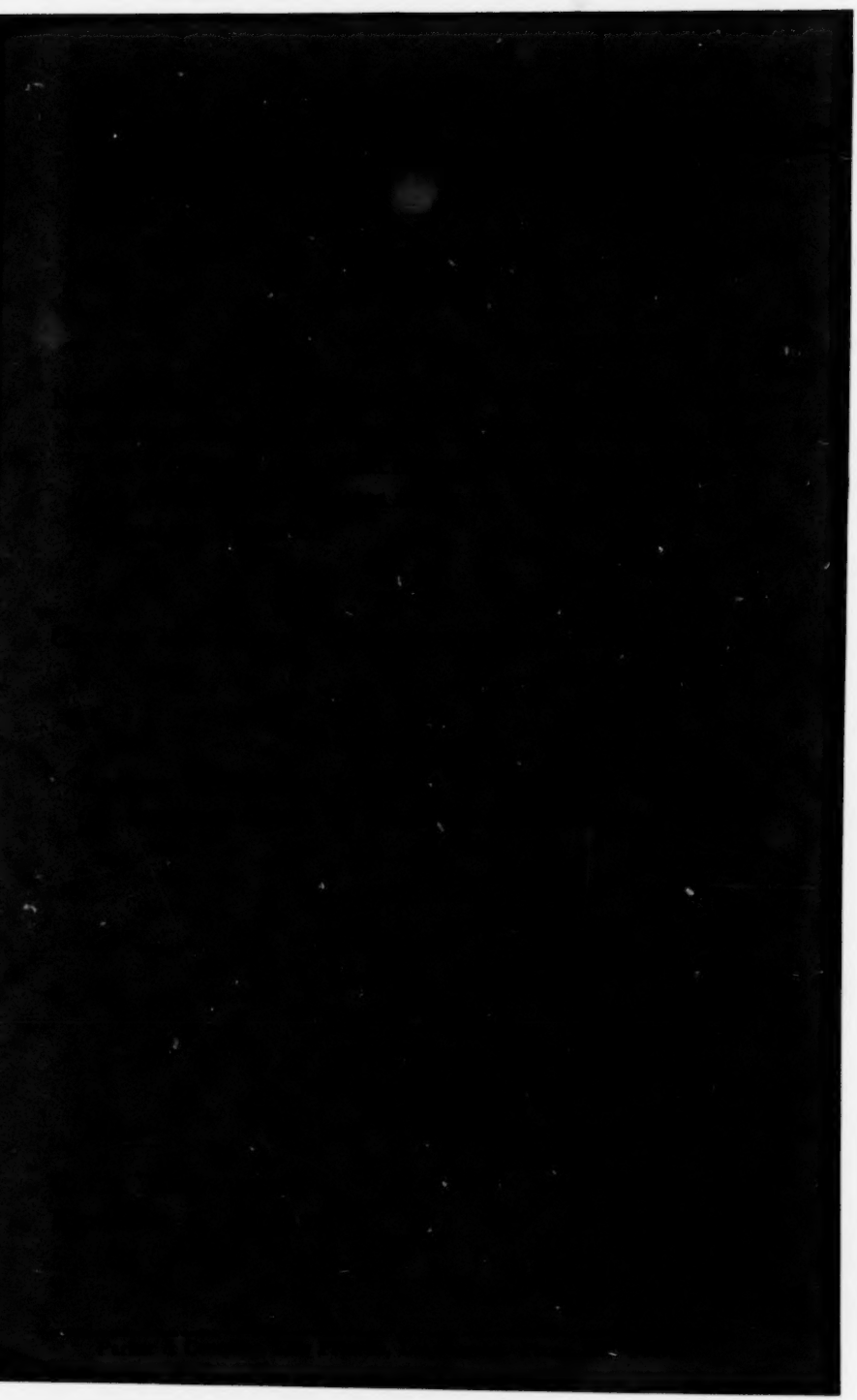
B. Other Uses

No use other than those specifically mentioned in this section as permitted uses or those determined by action of the Commission, in accordance with Paragraph 1 of Sub-section A of Section 15 of this Ordinance to be not more obnoxious or detrimental to the welfare of the community, shall be permitted; nor shall said Commission by such action determine that the following and similar uses are deemed to be uses permitted in the B-1 District; residences, camps, trailer camps, garages, automobile parking lots, theatres, dance halls, shooting galleries, skating rinks, bowling alleys, roller coasters, merry-go-rounds, restaurants, cafes and saloons.

C. Structures Permitted

1—No buildings, structures walls, or fences shall be erected in the B-1 District except life guard towers and open smooth wire fences neither of which shall have a height greater than four (4) feet above the grade of the nearest portion of the strand.

2—No sign shall be permitted or displayed in the B-1 District other than directional signs as specified below and one unlighted sign not exceeding four (4) square feet in area attached to each entrance gate to the property. No lights visible from the landward side shall be used to outline or otherwise decorate any such structure as is permitted. No flood lights shall be used except to illuminate active play areas in which case such lights shall be so shielded or arranged that they do not throw their light landward of the landward boundary of said District. Lighted directional signs, each not to exceed one (1) square foot in area, may be used to direct occupants of the beach to rest rooms, life-guard and first-aid stations and exits provided they are so arranged or shielded as not to throw their light landward of the landward boundary of the District.



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IN THE

Supreme Court of the United States

No. 765

October Term 1953

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of RALPH R. HUESMAN, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, City of Manhattan Beach, herein files its answer to the petition of Neil S. McCarthy, *et al.*, for Writ of Certiorari to the Supreme Court of the State of California.

Amplification of Summary Statement of the Case.

Respondent submits that the following material facts do not appear in petitioners' Summary Statement of the Case.

1. The zoning ordinance whose constitutionality is challenged before this court, was enacted in June, 1941, and placed petitioners' property in zone B1, Beach Recreational District. From 1923 until the enactment of said ordinance the property in question was zoned residential. During that eighteen year period not a single residence was constructed on said property. On August 9, 1940 (some eleven months prior to the adoption of the ordinance in question, and while said ordinance was under active study and in the course of preparation) petitioner Neil McCarthy published an advertisement in the local newspaper disclosing his intention to enclose the property in question and operate the same as a public beach, charging admission for its use [Deft. Ex. A; R. 152].

> ". . . it was suggested that the beach be operated as are many beaches in the United States—by enclosing it and charging an admission price for its use. I advised your Mayor, Mr. Blech, that I expected to do this." [R. 153.]

On August 12, 1940, petitioner Neil McCarthy stated that under existing conditions the property could not be sold or subdivided for residential purposes or practically or profitably be used for such purposes and requested that the property be rezoned for business purposes so that he could realize an income from its use [Ex. 38, R. 112]. After having received, in June, 1941, by the ordinance in question, the very zoning which petitioners had requested, they did not use or make any attempt to use the property

for the purposes permitted by the ordinance [R. 39]. The only complaints voiced by petitioners relative to the ordinance in question were made after an action to condemn the property in question was filed in 1948 by the State of California. In the case at bar petitioners contend the property should properly be zoned residential.

2. If any residences were constructed on petitioners' property such residences would be right on the beach [R. 321] and would necessarily be constructed on pilings [R. 195, 272]. While petitioners' property as measured on the ground does vary in width from 174 to 184 feet, the westerly, or oceanward, boundary line thereof is the mean high tide line of the Pacific Ocean. Therefore, much of petitioners' property is covered with water during portions of each day even when the ocean is calm. During storms or when there are ground swells due to distant storms, a major portion of petitioners' property is under water [R. 318].

3. At times, waves have been observed breaking upon and over the former Pacific Electric right of way which in its entirety lies easterly and further landward of petitioners' property [R. 267, 298].

4. The area is of such a character because of the ocean and tides that it would not be usable for structural development [R. 283], but is eminently suited for beach recreational use [R. 306].

5. The contour of petitioners' property, which is sandy beach except for a very small portion thereof [from Sixth Street south there is a shallow outcropping of soil, R. 319], is that of a sharp slope to the ocean varying from one foot in ten to two feet in ten [Exs. B, C and D; R. 241, 257].

6. As observed by the trial court [R. 318] the westerly side of the petitioners' proposed 35-foot roadway is at least 12 feet lower than the former Pacific Electric right of way.

7. The houses in the City of Hermosa Beach, south of petitioners' property, which are visible in the photographic exhibit annexed to the Petition, are at least twenty feet *landward* or *easterly* from the westerly or seaward line of any houses which might be constructed on petitioners' property [Court view, R. 320].

8. The ordinance refers to The Strand and limits structures to four feet above the nearest portion of The Strand. The height of the walkway known as The Strand varies from four feet above the nearest portion of the beach area to fifteen feet above the sandy beach. Therefore structures could be constructed to a height of a minimum of eight feet up to a maximum of forty feet over the actual surface of the beach.

9. In 1940 when petitioners attempted to fence their property with a smooth wire fence petitioners property was zoned for residential [Ex. 15; R. 68] and, obviously, therefore, the construction of the fence constituted a violation of the then zoning ordinance.

10. The very section of the ordinance under attack contained relief provisions authorizing different uses upon application to the City Council [Sec. 10-B of Ex. 1 to Comp., R. 20B; also Pet. App. A, R. 11]. No such application was ever made [R. 264].

ARGUMENT.

Summary of Argument.

Point 1. Petitioners have not proved any taking of property without due process of law. Although their property had been zoned residential for more than eighteen years prior to the enactment of the ordinance in question not a single residence was constructed thereon. While said ordinance was under consideration and shortly prior to its adoption petitioners stated that the property could not be reasonably used for residential purposes and requested that it be zoned for beach business purposes in order that an income could be realized from the property, and evidenced a desire to operate the same as a private beach with an admission charge. Moreover, the county planning expert testified that he recommended the change of zone from residential to beach recreational in order to allow petitioners to make a profitable use of their property.

After petitioners had by the ordinance in question received the very zoning which they had requested, they did not use nor attempt to use the property in conformity with the zoning ordinance and did not make any complaint, ask for any variance, or challenge the ordinance in any manner until after the State of California in 1948 brought an action to condemn the property. After the condemnation action had been filed, petitioners challenged the validity of the ordinance mainly on the ground that it constituted a taking of their property without due process of law. Yet petitioners did not introduce one particle of evidence as to the relative value of the property as residential property as contrasted to beach recreational property. No evidence of *any* dimunition in value resulting from the ordinance in question was introduced.

In fact, the evidence indicates that both petitioner Neil S. McCarthy and the planning expert Cook, believed at the time the ordinance was enacted that beach business zoning would *increase* the value of the land. The attack on the ordinance in question would appear to be a belated attempt to give an inflated value to the property which inflated value petitioners apparently hope will be reflected in any award which may be made in the condemnation proceedings.

Point 2. The ordinance in question was adopted after numerous public hearings and after intensive study and consideration by, among others, experts in the zoning field. Said ordinance was and is a valid and proper exercise of the police power designed as a part of the master plan of the City of Manhattan Beach to promote the public health, safety, morals and general welfare of the City of Manhattan Beach. The undisputed physical facts, evidence and findings of the trial court amply sustain the validity of the ordinance in question, and particularly the finding of the court that reasonable minds might differ as to the suitability of petitioner's property for residential development and that any residences constructed on said property would necessarily be constructed on pilings, thereby causing a serious police problem and threat to the public morals by reason of the possible use of the area under said structures for immoral purposes.

Point 3. No improper motive or purpose actuated respondent in enacting the ordinance in question. The record is clear that both petitioners and respondent endeavored for many years to interest one or more governmental authority in the property with the view to the purchase of the property by such governmental authority

and the establishment of the property as a public beach. Such negotiations at all times were carried on in good faith by all parties. Also, no evidence as to any improper motive was introduced. Not one city official was called to the witness stand to testify on this point.

Moreover, it is well settled that the purpose or motive of city officials in enacting an ordinance is irrelevant to an inquiry concerning the reasonableness of the ordinance. If the physical conditions justify the enactment of the ordinance the motives promoting its enactment are of no consequence. If the physical conditions do not justify the enactment, the ordinance must fall and the inquiry as to motive becomes useless.

Point 4. Zoning ordinances are endowed with a strong presumption of validity, that is, that it is presumed that they are reasonably adapted to promote the public health, morals, safety and general welfare of the community. Where, as in the case at bar, at the very least, the reasonableness of the ordinance is fairly debatable, the courts will not substitute their judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. Where, as in the case at bar, reasonable minds might differ as to the suitability of the property for residential development, the suitability of said property for beach recreational use, and the need to prevent the property in question from becoming a veritable breeding place of crime, the validity of the ordinance must stand.

POINT I.

The Ordinance Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioners contend that the ordinance so limits the use of their property as to constitute a taking thereof without due process of law. The record is devoid of any evidence supporting this contention.

For eighteen years (1923 to 1941) the property was zoned residential and not a one residence was constructed thereon. On August 9, 1940, at a time when the ordinance in question was under consideration and in the course of preparation, petitioner Neil S. McCarthy disclosed his intention to operate the property as a public beach charging admission for its use [Ex. A, R. 152]. Three days later, on August 12, 1940 Petitioner Neil S. McCarthy addressed a communication to respondent wherein he stated that the property could not be subdivided or sold as residential property or practically or profitably used as such and requested that it be rezoned [Pltf. Ex. 38, R. 112].

The county planning expert loaned to respondent in connection with the preparation of the ordinance in question testified that it would be "bad" and "unreasonable" zoning for the property in question to be continued to be zoned residential, that same property was eminently suitable for beach recreational use and that one of the considerations resulting in the enactment of the zoning ordinance in question was a desire to provide the owners of the property with the right to derive an income from it [R. 306-307].

From the enactment of the ordinance in question in June, 1941, to the time of the filing of the within action,

petitioners did not use or attempt to use the property in conformity with the ordinance in question [R. 39]. Petitioners did not introduce a particle of evidence that it could not have been profitably used in conformity with the ordinance nor did they introduce any evidence as to the relative values of the property as residential property as contrasted to beach recreational property. In fact, no evidence of value whatsoever appears in the record.

On these facts, respondent submits there is an entire absence of any showing of a taking of property or a denial of equal protection of law as guaranteed by the Fourteenth Amendment, and further, that there is not a particle of evidence to support petitioner's bald assertion (Pet. 21) that the ordinance deprives them of any reasonable or profitable used of the property.

Respondent has no quarrel with the general proposition that property may not be taken for public use without compensation and without due process of law. It is apparent, however, that each exercise of the police power of a municipality, and particularly each zoning ordinance, insofar as it restricts the use of property to the slightest degree, does interfere with the owner's use of the property and thereby *may* cause some dimunition in the value of the property. However, the constitutionality of zoning ordinances, restricting as they do the use of property, is no longer open to quested (*Euclid v. Ambler Realty Co.*, 272 U. S. 365). Respondent would be the first to agree that when the extent of a diminution in value of property resulting from a zoning ordinance reaches a certain magnitude (sometimes called a "shocking diminution") it may constitute a taking of the property. But, as this court held in *Pennsylvania Coal Co. v. Mahon,*

260 U. S. 393, this is a question of fact and the greatest weight is to be given to the judgment of the legislature. In the case at bar, there is no evidence of *any* diminution in value of petitioners' property resulting from the ordinance. In fact, there is no evidence of any value whatsoever. In short, petitioners failed to prove a taking of property (*Calif. Auto Assn. v. Maloney,* 341 U. S. 105, 111).

The cases relied upon by petitioners and set forth at page 23 of the petition, are, respondent believes, clearly distinguishable. As was stated by the Supreme Court of the State of California [R. 376] quoting from *Zahn v. Board of Public Works,* 195 Cal. 497, 234 Pac. 388; affirmed 274 U. S. 325:

> "Every exercise of the police power is apt to affect adversely the property interests of somebody."

The Supreme Court of California also aptly stated in the case at bar [R. 377]:

> "Factually dissimilar cases cannot avail plaintiffs in their attack upon the zoning restrictions upon due process grounds."

In the majority of the cases relied on by petitioners, there was evidence of a shocking diminution in the value of the property, resulting from the zoning ordinance. In *Pennsylvania Coal Co. v. Mahon, supra,* the diminution was total, the property was rendered valueless. In the remainder of petitioners, cited cases, the value was shockingly reduced, as for example in *Long v. City of Highland Park,* 329 Mich. 146, 45 N. W. 2d 10, from $40,000.00 to $3,000.00.

In the case at bar, *no* diminution in value was proven, in fact, no evidence of value whatsoever was introduced. On the contrary, the evidence indicates that at the time the ordinance was enacted, petitioner Neil S. McCarthy and the planning expert believed the value of the property would be *increased* by rezoning from residential to beach use.

There is no evidence that petitioner's property was taken or that petitioners were denied equal protection of law in contravention of the Fourteenth Amendment.

POINT II.

Section 10 of the Ordinance Is a Proper Exercise of the Police Power.

The trial court found that reasonable minds might reasonably differ (1) as to the safety of residences constructed on petitioners' property, and (2) whether said property would be suitable for residential development [R. 37, 39, 370]. Said court also found that residences constructed on pilings might create police problems by reason of the possible use of the areas under said structures for immoral purposes. Petitioners contend such findings are without "substantial support" in the evidence. Respondent submits that the evidence, a portion of which is hereinafter referred to, amply supports such findings and clearly demonstrates that the ordinance is in the words of the trial court "palpably related to the general welfare" [R. 331] and a proper exercise of the police power of respondent.

A. Safety of Residences Constructed on Pilings and Suitability of Subject Property for Residential Development.

Petitioners' sole evidence on this question consists of the testimony of their expert witness Col. Leeds, engineer, who testified on *direct* examination that residences could be constructed on the property, that he recommended construction on steel concrete pilings and that if constructed in accordance with a sketch received in evidence as Exhibit 62 [R. 198], said residences could be constructed without fear of damage from the Pacific Ocean [R. 198]:

> "Q. By Mr. Diether: In your opinion, Colonel Leeds, if the house was constructed at the elevation that you have just testified to in the manner indicated on the chart which you have described, could such a house be constructed without fear of damage from the Pacific Ocean? A. Yes, sir."

On *cross*-examination said Colonel Leeds admitted that reasonable minds might differ as to the dangers of such constructions [R. 231]:

> "Q. Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62? A. Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible."

Parenthetically, it should be noted that it is obviously humanly possible by the use of engineering skills to "safely" construct buildings many miles out in the ocean.

This court may take judicial notice of the fact, as did the Supreme Court of California [R. 374], that many offshore oil drilling and pumping derricks are located far out in the ocean and in the Gulf of Mexico. Thus as an academic issue there is no question but that residences might at considerable expense and by the expenditure of considerable engineering skill be "safely" constructed on petitioners' property provided the pilings were driven deep enough and the residences constructed high enough over the beach, thus eliminating all possible tide and wave action of the Pacific Ocean. However, the issue before the trial court was *not* whether it was or was not humanly possible to construct residences in such a manner as to be "safe" in times of storms, high tides and heavy ground swells. The issue was whether or not reasonable minds might differ as to whether petitioners' property was suitable for residential development and one factor in this determination was whether or not the normal beach residences constructed on the property would be free from dangers of destruction from the sea. This is illustrated by the testimony of petitioners' expert, Colonel Leedo, who stated that residences could be built, that he would build them in a certain manner, and that reasonable minds might differ as to their safety if thus constructed. If petitioners' eminently qualified expert admits that reasonable minds might differ can more be expected of respondent and is not this conclusive that the suitability of the property for residential development was a question upon which reasonable minds might differ?

Moreover, the trial court's finding of the unsuitability of the property for residential development finds further support in the following evidence:

1. In the 18 years the property was zoned residential not a single residence was constructed thereon.

2. Petitioner Neil S. McCarthy on August 12, 1940 stated that it could not be sold, subdivided or practically or profitably used for residential purposes and requested that it be rezoned [Ex. 38; R. 112].
3. The testimony of the county planning expert loaned to respondent to assist in the preparation of the ordinance in question was that residential zoning of the property would be "bad" and "unreasonable" and that he recommended the beach recreational zoning since the property was eminently suited for such use in order to allow the owners to derive an income from it [R. 306, 307].
4. Much of petitioners' property is covered with ocean water during portions of each day.
5. During storms or heavy ground swells a major portion of the property is under water [R. 318].
6. Ocean waves have been observed breaking upon and over the former Pacific Electric right-of-way which in its entirety lies eastward, or landward, of petitioners' property [R. 267, 298].
7. Any residences constructed on the property would all be right on the beach and unless protected by an adequate sea wall it would be subject to constant hazard of destruction by the sea [R. 321].

On the basis of the foregoing evidence respondent submits that there was substantial support for the finding that reasonable minds might differ as to the suitability of the property for residential use. The only plan for residential development suggested by petitioners provided for residences erected at an elevation considerably lower than the elevation of the former Pacific Electric right-

of-way [Ex. 62; R. 198]. When this is considered in connection with the uncontradicted testimony of witnesses who had lived for years in the City of Manhattan Beach that they had seen waves come up on the said Pacific Electric right-of-way [R. 267, 298] which is considerably higher and further landward than petitioners' property, it would appear obvious that with reference to the only type of residential constructions suggested by petitioners that ocean water might reasonably be expected on occasion to go over the eaves of any residence constructed thereon [R. 330]. Respondent submits that at the very least this amply demonstrates that the suitability or non suitability of the property in question for residential development was fairly debatable and a question upon which reasonable minds might differ. In fact, respondent submits that it would be difficult to find a reasonable mind which on such evidence would conclude that the property should, under good zoning practice, be developed for residential purposes.

B. The Construction of Residences on Pilings Tends to Create Police Problems and Adversely Affects Public Morals.

Witness Sights, Chief of Police of respondent testified that if residences were constructed on pilings, that due to the secluded nature of the area under the residences such areas would create special police problems. He testified that he had met such problems consisting of juvenile delinquency, sexual perversion etc., in connection with the policing of the area under the municipal pier

[R. 296, 297]. While said witness admitted that he was not familiar with police problems connected with *houses* constructed on pilings [R. 301], he testified that such problems would be the same as he then had with respect to the municipal pier [R. 299]. This is obvious since it matters not what structure is *over* the piling. The only relevant fact is that there is a secluded area *under* the structure which serves as a veritable breeding place for crime and juvenile delinquency. In short, construction on pilings is not the normal type of construction and of itself justifies restricted zoning. Municipal ordinances tending to minimize opportunity for immoral practices have long been upheld as a proper exercise of the police power, as for example in kindred cases involving billboards.

Cusack Co. v. City of Chicago, 242 U. S. 526, 529:

> "Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the Supreme Court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals * * * there remains sufficient to convincingly show the propriety of putting billboards * * * in a class by themselves * * * and to justify the prohibition against their erection in residence districts of a city in the interests of safety, morality, health and decency of the community."

POINT III.

Motive or Purpose of Respondent in Enacting the Ordinance in Question.

A. No Improper Motives or Purposes Actuated Respondent in Enacting the Ordinance in Question.

The record is clear that both petitioners and respondent endeavored for many years to interest one or more governmental authority in the property with the view to the purchase of the property by such governmental authority and the establishment of the property as a public beach. Such negotiations at all times were carried on in good faith by all parties. As the trial court said [R. 148]:

> "The record * * * is replete with documentary evidence showing that both parties were doing whatever they could to try to get some State agency to buy the land * * *."

The record referred to by the trial court consists of plaintiff's exhibits 21 through 33 inclusive and is illustrated by the following statement of petitioner Neil S. McCarthy [Ex. 27; R. 109 dated April 10, 1940]:

> "I am looking forward to the cooperation of the city in our attempt to dispose of the property, in the same manner that we have previously tried to cooperate with the city in our efforts to have some of the other public bodies push the property for the city."

The only request for rezoning made by petitioners until after the State of California had brought an action to condemn the property, is contained in Plaintiff's Ex 38 [R. 112] consisting of a letter in which petitioner McCarthy stated that since the property could not practically or profitably be utilized for residential development and

could not be subdivided or sold as such, that the property be rezoned. On August 22, 1940 said informal application for rezoning was denied but [Ex. 41; R. 114].

> "without prejudice to Mr. McCarthy making further proposals on this matter and if detailed plans for the operation and conduct of the enterprises Mr. McCarthy proposed to develop are submitted, it is possible that an interpretataion of the present Master Plan of Land Use would show that such use as proposed by McCarthy would be permitted, or in case the matter is not settled until after the detailed zoning ordinance shall have been adopted, that the proposed uses either would be permitted under the ordinance or could be handled by variance procedure."

In spite of the clear indication on the part of respondent to do everything within its power to cooperate with petitioners and allow them to use their property as they so desired, no further request was made of respondent, no variance application filed, and no action whatsoever taken until after the State of California brought its action to condemn the property for a state park.

Without further comment respondent submits that the record falls far short of showing an evil motive or purpose on the part of respondent, and on the contrary, shows absolute cooperation and good faith toward petitioners at all times.

Furthermore, as noted by the Supreme Court of California [R. 380] petitioners did not call one city official to the witness stand to testify as to the matter of motive

or purpose and thus no proper evidence of motive or purpose was before the court (*Safeway Stores v. City Council, San Mateo,* 86 Cal. App. 2d 277, 287, 194 P. 2d 720).

Petitioners attempt to draw support from the allegation that they attempted to fence their property in July 1940 and that the fence was destroyed by mobs. The possible damage through mob violence and respondent's liability, if any, in connection therewith are matters fully covered by statute (Cal. Govt. Code, Secs. 50140, 50141) and are not germane to the issue of reasonableness of the zoning ordinance. Moreover, *after* petitioners alleged difficulties in fencing, petitioner Neil S. McCarthy in August 1940 wrote Plaintiff's Exhibit 38 which admits the property could not be subdivided or sold as residential property or practically or profitably used for such purposes.

B. The Motives of the Legislative Body in Enacting an Ordinance Are Immaterial to Its Validity.

The purpose or motive of the city officials in enacting a zoning ordinance is not relative to any inquiry concerning the reasonableness of the ordinance. If the conditions justify the enactment of the ordinance the motives are of no consequence; if the conditions do not justify the enactment the inquiry as to motive becomes useless (*Sunny Slope Water Co. v. City of Pasadena,* 1 Cal. 2d 87, 99, 33 P. 2d 672). The cases cited by petitioners as examples of the maladministration of the police power involve factual dissimiliarities which renders

them inapplicable here. As hereinbefore noted, in the majority of said cases the evidence clearly demonstrated the relative value differentials in the property brought about by the zoning ordinances in question and disclosed a shocking diminution in value. In the case at bar we have no evidence of any diminution in value as a result of the zoning ordinance and on the contrary as hereinbefore demonstrated the evidence indicates that the present zoning when enacted, was thought by petitioners and the zoning expert to be more beneficial to petitioners. The case of *Dobbins v. Los Angeles,* 195 U. S. 223, is clearly distinguishable on its facts. Said case arose on demurrer in this court said at page 240:

> "Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case * * *."

See, also:

Detroit United Railway v. Detroit, 255 U. S. 171, 178.

In the case at bar the facts clearly authorize the exercise of the power and therefore any inquiry into the purpose or motive prompting its exercise is immaterial.

POINT IV.

General Zoning Principles Applicable to the Case at Bar.

This court has long recognized, beginning with *Euclid v. Ambler Realty Co., supra,* that restrictive zoning ordinance are a proper exercise of the police power. As this court said in *Zahn v. Board of Public Works, supra,* at 328:

> "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (Citing cases.)

To the same effect:

Standard Oil Co. v. Marysville, 279 U. S. 582.

The aforementioned rule has long been followed in the State of California. (*Lockard v. City of Los Angeles,* 33 Cal. 2d 453, 202 P. 2d 38, cert. den. 337 U. S. 939; *Clemons v. City of Los Angeles,* 36 Cal. 2d 95, 222 P. 2d 439; *Wilkins v. City of San Bernardino,* 29 Cal. 2d 332, 171 P. 2d 542. The case at bar would appear to be one in which, at the very least, the reasonableness of the ordinance was fairly debatable and the ordinance should therefore stand.

Conclusion.

Respondent submits that the language of the Supreme Court of Michigan in *Fenner, et al. v. City of Muskegon,* 331 Mich. 732, 50 N. W. 2d 210, 212, could well have been said with reference to the property involved in the case at bar:

> " 'It (the land) is mucky, wet, sandy and low and it would seem always in danger in the event of flood or high waters. Up to this point it would seem that the past owners and present owners have used it to the best of their ability, for the only purpose to which it is adaptable.'
>
> Clearly, the land is not suitable for residential purposes nor any purposes under Class 'A' of the zoning ordinance."

Respondent further submits that the instant case is comparable to the *City of Miami Beach v. Hogan,* 63 So. 2d 493, Pet. for Writ of Cert. den. 346 U. S. 891. In the *Hogan* case the property had been zoned residential since 1930. In 1950 an action to condemn the property was filed. Petitioner in that case sought to enjoin the condemnation action charging that the proper zoning of the property was for business. The Supreme Court of Florida declared at page 495:

* * * * * * * *

> "The landowner in this case sat idly by and took no action about the zoning ordinance adopted on December 3, 1930, until it brought this suit. After the city had decided to acquire the property by the exercise of eminent domain the landowner goes into a court of equity in an attempt to have the property rezoned, not because he wished to erect a hotel, but because if it is rezoned for hotel use, the value will

be greatly increased and the city will be compelled to pay the increased value brought about by rezoning in order to obtain the property for a public purpose.

* * * * * * * *

"If the Courts adopt the policy of substituting their judgment for that of the city officials, simply because of their refusal to rezone the property in accordance with the wishes of the landowner to increase the value of the land, they will eventually become the zoning board for every county and municipality in the State."

Respondent submits that the present challenge to the zoning ordinance and the petition for Writ of Certiorari should be recognized for what it is, to wit, an unjustified effort to obtain a fancied advantage in the valuation of the property for the purposes of a condemnation action, that no valid grounds for a Writ of Certiorari are present, and that therefore the Petition for Writ of Certiorari should be denied.

Dated: June 14, 1954.

Respectfully submitted,

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